***United States Court of Appeals***

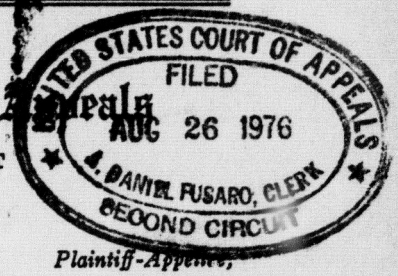
***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

# 76-7208, 76-7211

*To be argued by*
ROBERT S. BLANC

ORIGINAL




## United States Court of Appeals

FOR THE SECOND CIRCUIT

BENITO LOPEZ,

*Plaintiff-Appellee,*

—against—

EGAN OLDENDORF,

*Defendant and Third Party Plaintiff-Appellant and Appellee,*

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC. and HOFFMAN RIGGING AND CRANE SERVICE, INC.,

*Third Party Defendants-Appellants and Appellees.*

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BENITO LOPEZ,

*Plaintiff-Appellee,*

—against—

EGAN OLDENDORF and HOFFMAN RIGGING & CRANE SERVICE, INC.,

*Defendants-Appellants and Appellees.*

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**On Appeal from the United States District Court for the Southern District of New York**

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# REPLY BRIEF OF THIRD PARTY DEFENDANT-APPELLANT AND APPELLEE, HOFFMAN RIGGING AND CRANE SERVICE, INC.

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### Cases Cited

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## REPLY BRIEF OF THIRD PARTY DEFENDANT-APPELLANT AND APPELLEE, HOFFMAN RIGGING AND CRANE SERVICE, INC.

## The Scope of this Reply Brief

This brief is primarily a reply to the answering brief of International Terminal Operating Co. Inc., which was denominated Reply Brief and which deals with Hoffman's contention that it is not liable because the crane operator was the borrowed servant of the stevedore, ITO.

## Statement of Relevant Facts

The shipowner, Oldendorf, engaged the stevedore, ITO, to discharge the vessel aboard which the plaintiff, employee of the stevedore, was injured. To effect discharge of steel beams from No. 1 hatch, ITO required the use of a shore based mobile crane. As stated in ITO's answers to Hoffman's interrogatories, verified March 24, 1975 and filed April 30, 1975, "Hoffman Rigging & Crane Service, Inc. rented a crane and furnished personnel to ITO * * *".

The crane operator, Hogan, and his oiler, Spillane, brought the crane to the pier at which the vessel was berthed and positioned the crane on the pier in proper attitude for use after having boarded the vessel and viewed the hatch (240a, 245a). The crane operator went aboard the vessel to determine how to position the crane carrier, the chassis, but the positioning of the crane boom was directed by the ITO signalman (260a-261a).

Gomez, the ITO signalman, testified that it was the job of the signalman to signal the crane operator, who could not see into the hold, where the signalman wanted the boom placed (48a-49a). In the course of the operation which resulted in injury to the plaintiff, Gomez signaled to the crane operator to swing his hook over to where the draft was being made up. When the chains

around the draft were hooked on to the crane and the longshoremen in the hold had started to walk away, Gomez gave a signal to raise the draft (69a-70a). Hogan, the crane operator, testified that all movements of the crane were directed by the signalman, Gomez (248a). Hogan could not see into the hold from his position in the cab and was dependent for direction upon the signalman (281a).

Further relevant facts, particularly with respect to the question of signals, will be set forth in the course of argument.

## POINT I

**The crane operator, Hogan, was the borrowed servant of ITO and Hoffman is not liable to any party in the litigation.**

Contrary to the contention of ITO (Reply Brief, p. 3), it is not the contention of Hoffman that the crane operator passed out of its employ merely because he received signals from an ITO signalman while the draft was in the hold and not visible to him. It is the contention of Hoffman that it "rented a crane and furnished personnel to ITO" for employment by ITO as stevedore contractor which had engaged to discharge the vessel and that ITO assumed direction and control of the crane operator in furtherance of that task.

In the circumstances the crane operator was the borrowed servant and employee of the stevedore. As stated in Hoffman's main brief on this appeal, the applicable rule is set forth in *Denton* v. *Yazoo & M.V.R.Co.*, 284 U.S. 305 (1932) at p. 308:

> "When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as a servant of the latter and not of the former."

Hoffman falls squarely within that rule.

ITO cites a number of cases in support of an apparent argument that ITO and Hoffman were engaged in a co-operative endeavor of a nature which precludes application of the borrowed servant rule. The cases are briefly considered.

*Standard Oil Company* v. *Anderson,* 212 U.S. 215 is analyzed in *Denton* v. *Yazoo & M.V.R. Co.* at p. 310:

> "This court held upon the facts, in the light of the rule which we have just stated and discussed, that the power, the winch, and the winchman were those of the company, and that the company did not furnish *them,* but furnished the *work they did* to the stevedore; and this work was done by the company as its own work, by its own instrumentalities and servant under its control."

The distinction is clear. Here, the crane operator was doing the work of ITO under ITO control.

In *Shenker* v. *Baltimore & Ohio R. Co.,* 374 U.S. 1 (1962), an F.E.L.A. case, a Baltimore & Ohio Railroad employee sued the Baltimore & Ohio and the Pittsburgh & Lake Erie Railroad for injury sustained when loading freight on a Pittsburgh & Lake Erie car. The Baltimore & Ohio Railroad "suggested" that the plaintiff might have been the employee of the Pittsburgh & Lake Erie Railroad within the meaning of the common law loaned-servant

doctrine. The Supreme Court, in rejecting "the intimations of the B & O that the petitioner might have been given directions by the P & LE baggage man is at most an example of the minimum cooperation necessary to carry out a coordinated undertaking * * *. The whole tenor of the services the B & O provides for the P & LE speaks of an agreement by the B & O to manage and operate the P & LE station * * *. On such evidence, the petitioner is clearly an employee of the B & O even under the common law loaned-servant doctrine * * *." (374 U.S. at p. 6)

Again, the case is clearly distinguishable. In the instant case, ITO had contracted with the shipowner to discharge the vessel, was in control of the operation and in control of the crane and personnel employed in the operation.

In *Dornan* v. *U.S.*, 460 F.2d 425 (9 Cir., 1972) a contractor engaged in the construction of a dam asked the United States Army to provide a landing craft to assist in controlling severe flooding conditions which endangered the project. The Army provided the craft and its operators without cost to the private contractor. Plaintiff, an employee of the dam contractor, was injured in the course of the landing craft operation. In reversing the lower court finding that the operator of the landing craft was the borrowed servant of the dam contractor the Circuit Court held, *inter alia,* that the landing craft operator remained in the employment of the Government while operating Government equipment to assist a private employer during an emergency and that the presumption that the landing craft operator did not depart his federal employ was further supported by his expertise as a landing craft operator and by his complete control over the manner of operating the craft. In *Dornan,* the landing craft and operators had been supplied gra-

tuitously by the Government to the contractor, and the Circuit Court observed that "if a servant on the payroll of one employer is ordered by his employer to go help another employer without any consideration passing between the two employers, it would appear *a fortiori,* that the traveling servant remains primarily under the direction and control of his master who is paying his wages." In the instant case, Hoffman "rented the crane and furnished personnel to ITO" for a consideration and placed both under the direction and control of ITO. Unlike the situation in *Dornan,* where the landing craft operator had complete control over the manner of operating the craft, the crane operator was subject to the direction of ITO.

The situation in *Williams* v. *Pennsylvania RR Company,* 313 F.2d 203 (2 Cir., 1963) was markedly similar to that obtaining in *Standard Oil Company* v. *Anderson, supra.* The Circuit Court found that a railroad hoister operator who remained in control of the railroad's hoister and was doing the railroad's work did not become the employee of the company whose signalman was giving him directions. The case is distinguishable on the same ground as *Standard Oil* v. *Anderson, supra.*

Hoffman placed its servant and equipment at the disposal and under the control of ITO for the performance of a particular service, and the acts of that servant in that service were the acts of ITO and not of Hoffman. *Denton* v. *Yazoo & M.V.R. Co., supra.*

See also:

*McCollum* v. *Smith,* 339 F.2d 348 (9 Cir., 1964);
*United States* v. *N.A. Degerstrom, Inc.,* 408 F.2d 1130, 1132 (9 Cir., 1969);
*"Finagrain" Compagnie Commerciale, etc.* v. *Miller Compressing Co.,* 349 F. Supp. 288 (E.D. Wisc., 1972);

*Helton* v. *United States,* 309 F.Supp. 479, 484 (D.C. Ark., 1969).

If the crane operator was negligent, as decided without findings of fact or conclusions of law by the Trial Court, ITO and not Hoffman is liable for that negligence on the principle of *respondeat superior.*

## POINT II

**The Trial Court committed dual error (1) in holding the crane operator negligent and (2) in holding Hoffman Rigging & Crane Service, Inc. liable even if negligence existed.**

Gomez, the signalman, testified that he was facing the hatch when giving signals to the crane operator (49a). He stationed himself in a position on the deck of the vessel where he was visible to the crane operator (64a). At the time of the draft which resulted in the injury he was on deck looking down diagonally across into the off-shore side of the lower hold with the crane operator behind him (90a). It was the signalman's testimony that he gave the crane operator a signal to raise the beams which had been secured to the cargo hook by means of the cable. He did not give a signal to the crane operator to move the boom of the crane but the crane operator did so (90a-91a). The beams were picked up on the off-shore side of the hold and dragged across the cargo in the hold for a period of 15 seconds and over a distance of 25 feet before it struck the beam which fell on the plaintiff. He then signaled the crane operator to stop the movement (98a-100a). The signalman testified, further, that after he had given the first signal to the crane operator to raise the draft, the crane operator "took the

strain out of the chains", that is went up, and then topped the boom. He gave no signal to the crane operator not to top the boom and continued to look at the draft (101a).

Hogan, the crane operator, testified that after receiving the signal to raise the draft from the ITO's signalman he took a strain on the cable to draw the cables taut and the signalman continued to signal the raise movement. The crane operator paused and the signalman looked at him and the crane operator then indicated that he was going to raise the head of the boom (251a-252a). The movement continued for 15 seconds after which the crane operator received a signal from the ITO signalman to stop and slack off the load (247a-248a).

Yokum, a crane expert called on behalf of Hoffman, testified that the procedure followed by the crane operato fitted exactly into the normal procedure in that type of operation (283a-284a). Yokum testified, further, that it was the obligation of the signalman to signal the crane operator not to proceed with the operation if it would jeopardize the job or if there were some reason that the signalman knew that the operation should not be performed (286a), and if the signalman were aware that there was any danger involved it was his duty to stop the operation. If there appeared to be no danger and the load was drifting in the way that everybody would expect it to under the circumstances there would be no reason to stop the load from moving and to continue with the lift (289a).

In finding against Hoffman on the claim of the plaintiff, the Trial Court stated that it was persuaded that the raising of the boom "by Hoffman" was negligent because the "Hoffman crane operator" topped the boom without any signal from the signalman (300a). Yet the Court explicitly comments that the signalman said nothing

whatever about any signal from the crane operator that he was going to raise the boom and nothing about his turning around to look at the crane operator (301a). The testimony of the crane operator was unequivocal that he signaled the ITO signalman that he was topping the boom, that he did so and that he continued the operation for 15 seconds before receiving a signal to stop. The signalman confirms that the boom was in fact topped and that he permitted the operation to continue for 15 secons before signalling the stop. The signalman, as the Court observes, did not controvert the testimony of the crane operator. Yokum, the crane expert, testified that the operation described was a normal one.

The conclusion of the Trial Court that the crane operator was negligent is clearly erroneous because wholly without foundation in the evidence. There is no conflict between the testimony of the crane operator and the testimony of the signalman requiring resolution or the resolution of which would justify the conclusion that the crane operator was negligent. The signalman with hatch conditions and the longshoremen in the hatch in his view watched a normal operation for 15 seconds without exercising the control which was his alone until the draft struck another beam and toppled it on the plaintiff. If there was any negligence the negligence was that of the signalman.

Assuming, however, that the crane operator was negligent, the Trial Court clearly erred in finding Hoffman liable on the basis of the crane operator's negligence. In the absence of findings of fact and conclusions of law it is not possible to state it with certainty, but it would appear that the Trial Court ignored the Hoffman defense of borrowed servant in the literal sense that it never considered it and necessarily never passed upon it.

It has been argued, it is believed correctly, that the crane operator was the borrowed servant of ITO. In *Standard Oil* v. *Anderson,* 212 U.S. at p. 220 the court stated:

> "The servant himself is, of course, liable for the consequences of his own carelessness. But when, as is so frequently the case, an attempt is made to impose upon the master the liability for those consequences, it sometimes becomes necessary to inquire who was the master at the very time of the negligent act or omission. One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation."

It may have been the view of the Trial Court, as it was the view of the court in *Ciejek* v. *Crane Service Company,* 351 F.2d 788 (Ct. of Appeals, District of Columbia, 1965), cited in ITO's reply brief at pp. 4-5, that an employee cannot be a borrowed servant if he was negligent. That view is contrary to law. The borrowed servant rule comes into play when there is negligence in a claim of liability on the theory of *respondeat superior.*

In *United States* v. *N.A. Degerstrom, supra,* the operator of a loader did not see a hand signal and negligently caused the loader to strike a rock causing damage. The operator was nevertheless found to be a loaned servant. In *McCollum* v. *Smith, supra,* the crane operator ignored or failed to correctly interpret signals, took none of the usual precautions before commencing a move that was potentially harmful, and yet was found to be a borrowed servant. In *"Finagrain" Compagnie Commerciale, etc.,*

*supra,* the crane operator swung a load too low causing damage. He was held to be a borrowed servant.

In the instant case, Hogan, the crane operator, was the borrowed servant of ITO and if he was negligent ITO and not Hoffman is liable to the plaintiff and the Court erred in imposing liability upon Hoffman directly and by way of indemnity to the shipowner.

## CONCLUSION

**Judgment insofar as it imposes any liability upon Hoffman should be vacated and set aside with costs to Hoffman as appellant.**

Respectfully submitted,

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ROBERT S. BLANC
*Of Counsel*

375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

U.S. Court of Appeals for the Second circuit

Lopez

Lopez

vs

Intern'l te rm

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,

COUNTY OF NEW YORK, ss:

Afrim Haskaj being duly sworn,

deposes and says that he is over the age of 21 years and resides at 1481 42nd st Bklyn

That on the 26th day of August, 1976, 1975

he served the annexed brief upon

DiCostanzo, Klonzsky & Cutrona, Attorneys for the appellee Lopez
66 court street, Bklyn, NY

Cichanowicz 7 Callan, attorneys for the apellant-appellee, Oldendorf,
80 Broadway street, NY, NY

Alexander ash Schwartz, & Cohen, attorneys for the appellant-appellee Interna'l
801 Second avenue, NY, NY

in this action, by delivering to and leaving with said attorneys

two ~~three~~ XXX true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 26th

day of August, 1976, 1975

Robert W. Johnson

ROBERT W. JOHNSON
Notary Public, State of New York
No. 4[illegible]05
Qualified in Delaware County
Commission Expires March 30, 19 77

} Afroim Haskey